IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1158

ERONEOUS SHIPP,
Petitioner,

v.

TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The court of appeals' opinion — F.2d —, 17 F.E.P. cases 1430 (Aug. 7, 1978) is in petitioner's Appendix pp. 37(a)-54(a). The opinions of the district court on December 20, 1974 and Sept. 25, 1975 are not officially reported but are found in the petitioner's Appendix, pp. 1a-8a and 9a-36a.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978. A petition to rehear was filed on Aug. 18, 1978 and overruled on October 26, 1978. The petition for a writ of

certiorari was filed on January 24, 1979 and is therefore out of time under Rule 22(2) of the rules of this Court. But see Department of Banking v. Pink, 317 U.S. 264, 266 (1942); Foreman v. United States, 361 U.S. 416 (1960). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The three questions presented by the petition in this case are not fairly raised in the record in the opinion of the court of appeals. The true question presented is whether this case, which was never certified as a class action—or even asked to be certified as a class action—may be properly maintained as a class action and whether the plaintiff is a proper representative of a never-defined and never-certified class of persons alleging that they were discriminated against by the Memphis area office of the Tennessee Department of Employment Security.

STATEMENT

After a bifurcated bench trial in the United States District Court for the Western District of Tennessee in Memphis on March 20-22, 1974 and April 23, 1975, a lengthy opinion and judgment in favor of the defendants was entered on September 25, 1975. The court held that the plaintiff, Eroneous Shipp, had not been subjected to any discrimination based on race in the decision of the Memphis Area Office of the Tennessee Department of Employment Security not to refer him for a job at a local industrial plant and that the defendants had not engaged in a pattern or practice of racial discrimination which would entitle a class of persons purportedly represented by named Plaintiff Shipp to any relief. The Court of Appeals affirmed, Pet. App. 37a-54a.

1. On March 7, 1969, the plaintiff, Eroneous Shipp, a black man, responded to an advertisement placed by the Memphis Area Office of the Tennessee Department of Security on black-oriented Memphis radio station, WLOK, announcing a job opening for an assistant traffic manager. Shipp, a school teacher, called the Memphis area office, inquired about the job and described his qualifications. He received a discouraging answer but, undismayed, picked up an application and on the following Monday appeared at the local office, clipboard in hand. He demanded to be referred to the job, and took notes on everything that was said. The interviewer advised him that he was not qualified and refused to refer him. When he insisted that she call the employer anyway, she did, and only then learned that the job had been filled from another source. Plaintiff then angrily accused the interviewer of not referring him because of his race, confronted her superiors, and then retired to his lodgings to draft a statement based on his notes of the experience. After re-writing the statement several times, Shipp presented his report to the NAACP and then filed a timely complaint with the Equal Employment Opportunity Commission. After the EEOC investigation was completed and within 30 days after receiving notice of his right to sue, plaintiff filed this civil action, alleging that the original defendant, Memphis Area Office of the Tennessee Department of Employment Security, discriminated against Negro job applicants by classifying and referring them exclusively to badly-paid, menial, unskilled or demeaning jobs without regard to actual abilities, experience and interest of those applicants.

2. No Rule 23 certification of the class was ever made or even requested. The petition states at Page 5 that "at a pre-trial conference on March 8, 1974 plaintiff expressly sought a more formal ruling on the propriety of the class action." Ths statement is not supported by the record. Another statement (on the same page) that the court took no formal action because "counsel for TDES stipulated that the March 8, 1974 conference of

the case was a proper class action" is not supportable either. Nevertheless, it is beyond dispute that the District Court considered what it repeatedly called the "class action" aspects of this case," (see, e.g., Pet. App. 10a) at great length, and held that no pattern or practice of discrimination on the basis of race for the Memphis Area Office could be demonstrated. Experts for both sides agreed that no such pattern was shown by the computerized data presented, including detailed records of over 52,000 referrals by the Memphis Area Office. Disparities in the wage levels of TDES referrals by race (TDES referrals are almost 70 per cent black) were explained by Dr. Joseph Ullman, plaintiffs' expert, as resulting from the differences in education and experience levels of white and black applicants. Sophisticated control methods employed by the plaintiff's expert to eliminate natural disparity arising from these differences were successful. The defendants' expert, Temple University Department of Statistics chairman, Dr. Bernard Siskin, was able to demonstrate that the Memphis Area Office (which both sides agreed was specifically organized to aid the disadvantaged) could actually be said to be affirmatively discriminating *in favor* of black who were, on the average, referred to better-paying, higher-skilled jobs than whites with similar education and job experience.

3. The court of appeals held that the district court's finding that the plaintiff had not been discriminated against was not clearly erroneous. Pet. App. 49a-50a. The court of appeals further held that plaintiff was not eligible to represent a class of persons who were allegedly injured by discrimination because of the district court's finding that he was not injured himself and and the fact that this finding preceded certification. The Court of appeals specifically stated "plaintiff never motioned the Court for class certification, nor did the District Court certify the class *sua sponte*." The court of appeals added that, since Shipp had never been a TDES employee or even an applicant, his bid to represent a class of TDES employees failed to meet the typicality requirement of Rule 23(a)(3). Pet. App. 52a.

ARGUMENT

1. The petition would have considerably more appeal if it correctly reflected the content of the record and the holding of the court of appeals. For example, it is clear that the district court did not "erroneously fail to certify the class action," but that the plaintiff failed to request such a certification. And the pretended "stipulation" during the pretrial conference, where the plaintiff "expressly sought a more formal ruling on the propriety of the class action" is not supported by the record, to put it mildly. Petitioner's statement that the Sixth Circuit held that "the District Judge, despite two requests by plaintiff's counsel [neither of which are in the record], erroneously failed to decide whether the case should be formally certified as a class action" (Pet. 9) does not fairly reflect Judge Keith's holding for the unanimous Court. What Judge Keith did say was that Shipp was not a proper class representative because (a) his individual claim was held to be without merit before certification and (b) his claim was not typical because of his failure to be a member of the class—or one part of the class—he sought to represent—namely TDES' employees and applicants for employment. Indeed, except for the petitioner's attempts to supplement the record with non-existent requests for certification and "stipulations" this case is identical to the procedural situation in East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977).

2. Petitioner's second reason for granting the writ alleges that the court of appeals' decision holds that an individual claim of discrimination can be rejected without deciding whether there is a pattern of practice of discrimination. The court of appeals held no such thing. Indeed, the District Court made *two* rulings that Shipp's individual claim was without merit. The first ruling was made only after the Judge had heard all the evidence on Shipp's individual claim and all of the *plaintiff's* evidence, statistical and otherwise, on the pattern and practice

allegations. It is true that the plaintiff asked the Trial Judge to reconsider the ruling on the individual claim. He did so and, after hearing the *defendants'* pattern and practice evidence, reaffirmed his initial holding. The procedure employed was entirely consistent with the holdings of this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973); Teamsters v. United States, 431 U.S. 324, 357-62 (1977); and Franks v. Bowman Transportation Company, 424 U.S. 747, 772-773 (1976).

Whatever merit here is to petitioner's implied argument that the Trial Judge erred in deciding the plaintiff's individual claim without making an actual finding on the existence of a pattern or practice of discrimination (even though he had already heard the plaintiff's entire case) was certainly remedied by his reconsideration and reaffirmation of his holding after hearing the defendants' expert.

We agree that even in the case where a trial judge denies certification—properly or improperly—the individual plaintiff would be entitled to discover and introduce evidence of a general practice of discrimination in support of his own claim. The court of appeals did not hold to the contrary. There is nothing in the petitioner's argument on this issue which deserves plenary review of this Court.

3. Petitioner's third argument that certiorari should be granted to clarify what form of Order is required to constitute a class certification under Rule 23 is similarly contrived. Whatever form of order is required, it is clear that *some* kind of order is required. Since the plaintiff never even sought an order and since the district court entered none at all, there is no reason to grant certiorari on this issue, since it is entirely unnecessary to the decision of this case after East Texas Motor Freight v. Rodriguez, *supra*.

CONCLUSION

This case is no different from East Texas Motor Freight v. Rodriguez. The petition for a writ of certiorari should be denied.

Respectfully submitted,

HAILE & MARTIN, P.A.

HENRY HAILE